NO. 82-1749

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

METROPOLITAN ATLANTA RAPID
TRANSIT AUTHORITY,

Petitioner,

v.

GEORGE C. KELLY,

Respondent.

On Writ of Certiorari To The United States
Court Of Appeals For The Eleventh Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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(404) 378-0000

Attorneys for Respondent

Dated: July 29, 1983

QUESTIONS PRESENTED FOR REVIEW BY PETITIONER

May an employee maintain an action against his employer for discriminatory employment practices on the basis of handicap under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, if the primary purpose for which the employer receives federal financial assistance is something other than to provide employment.

PARTIES

The names of all parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit appear in the caption of the case in this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes	Page
Rehabilitation Act of 1973, as amended, § 504, 29 U.S.C. § 794	i, 2, 3, 5, 6, 7, 8, 9, 10
Rehabilitation Act of 1973, as amended, § 505, 29 U.S.C. § 794a	2, 9
Title VI of the Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d	7
Title VI of the Civil Rights Act of 1964, § 604, 42 U.S.C. § 2000d-3	9, 10
Title IX of the Education Amendment of 1972, 20 U.S.C. § 1681	9
28 U.S.C. § 1254(1)	2

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Petitioner,

v.

GEORGE C. KELLY,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Respondent, GEORGE C. KELLY, respectfully prays that the Petition For Writ of Certiorari filed in the above-styled matter to review the decision of the United States District Court of Appeals For The Eleventh Circuit be denied.

OPINIONS BELOW

The judgments and opinions in this case of the United States District Court For The Northern District of Georgia, Atlanta Division, and The United States Court of Appeals for the Eleventh Circuit are unreported, but copies are attached to the Petition for Writ of Certiorari filed in this case as Items A-1, A-2, and A-3.

JURISDICTION

The Respondent does not dispute the Petitioner's statement that this Court has jurisdiction to consider its Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Petitioner correctly quotes the statutes to be construed in this case. They are §504 of Rehabilitation Act of 1973, as amended, 29 U.S.C. §794; §505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794a; §604 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-3.

STATEMENT OF THE CASE

For the purposes of this Response, the Respondent does not dispute Petitioner's Statement of the Case. In summary, the Respondent filed a Complaint in the United States District Court For The Northern District of Georgia, Atlanta Division, alleging that the Petitioner, his employer, had discriminated against him in its employment practices because of his handicap in violation of § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794. The Petitioner answered and filed a Motion for Summary Judgment alleging that the Respondent did not have standing to maintain an action against it for discriminatory employment practices based on handicap under § 504 of the Rehabilitation Act because the primary purpose for which it received federal funds was for something other than providing employment. For the purposes of this Motion for Summary Judgment, the Petitioner did not dispute the allegations of the Respondent that the Respondent had been discriminated against by it because of his handicap, and the Respondent did not dispute the allegations of the Petitioner that the primary purpose for which it received federal funds was for something other than providing employment.

The District Court granted the Petitioner's Motion for Summary Judgment on the narrow legal

issue stated above, and the United States Court of Appeals for the Eleventh Circuit reversed the District Court on the basis of its decision in Jones v. MARTA, 681 F.2d 1376 (11th Cir. 1982) petition for cert. filed, 51 U.S.L.W. 3535 (Jan. 11, 1983) (No. 82-1159).

GRANTING THE PETITION FOR WRIT OF CERTIORARI IN THIS CASE WOULD HAVE NO USEFUL PURPOSE AND, THEREFORE, SHOULD BE DENIED.

I. THE KEY ISSUES WHICH THE PETITIONER HAS REQUESTED THE SUPREME COURT TO REVIEW IN THE INSTANT CASE ARE IDENTICAL TO THOSE ISSUES RAISED IN LESTRANGE V. CONSOLIDATED RAIL COPR., 687 F.2d 757 (3rd Cir. 1982), CERT. GRANTED, 51 U.S.L.W 3611 (Feb. 22, 1983) (N. 82-862), IN WHICH CASE THE SUPREME COURT HAS ALREADY GRANTED A WRIT OF CERTIORARI.

In its statement of "Reasons for Granting the Writ" the Petitioner maintains that there is a split between the Circuits on the controlling issue in this case, namely, whether an employee has standing to bring a private action against an employer under § 504 of the Rehabilitation Act of 1973 when although the employer receives federal financial assistance, employment is not a primary purpose of the federal funding. It is true that there is a split on this issue. While the Third Circuit[1] and the Eleventh Circuit[2] have ruled that an employee

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1 LeStrange v. Consolidated Rail Corp., 687 F.2d 767 (3rd Cir. 1982), cert. granted, 51 U.S.L.W. 3611 (Feb. 22, 1983) No. 82-862).

does have standing to bring such an action, the Fourth Circuit[3/], the Eighth Circuit[4/], and the Ninth Circuit[5/] have ruled to the contrary.

Presumably, to address this split the Supreme Court has granted a Writ of Certiorari in LeStrange, supra. As the central issue in LeStrange, supra, and the instant case is identical, to grant the Petition for Writ of Certiorari in the instant case would add nothing to the Court's analysis in this matter.

Further, in its "Reasons for Granting The Writ," the Petitioner states that there are two other issues in the instant case which must be addressed to clarify the application of § 504 of the Rehabilitation Act. First, does § 504 afford a private cause of action under any circumstances, and secondly, if so, exactly what is the scope of the right or the test to be utilized to determine that scope.

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2 Jones v. MARTA, 681 F.2d 1376 (11th Cir. 1982) petition for cert. filed, 51 U.S.L.W. 3535 (Jan. 11, 1983) (No. 82-1159).

3 Trageser v. Libbie Rehabilitation Center, Inc., 590 F. 2d 87 (4th Cir. 1978), cert. denied. 442 U.S. 947 (1979).

4 Carmi v. Metropolitan St. Louis Sewer District, 620 F.2d 672 (8thCir. 1980), cert. denied, 449 U.S. 892 (1980).

5 Scanlon v. Atascadero State Hospital, 67 F.2d 1271 (9th Cir. 1982).

The issue of whether a private right of action exists in a case brought under § 504 of the Rehabilitation Act is not properly before the Supreme Court in the instant case as the District Court's opinion and the Eleventh Circuit's opinion were based on other grounds and did not deal with this issue. Further, even if the issue was properly before this Court, it has been firmly established that such a private cause of action exists. Cannon v. University of Chicago, 441 U.S. 677, 99 S. Ct. 1946, 1957 (1979) states "the critical language in Title VI ha(s) already been construed as creating a private remedy," citing Bossier Parish School Board v. Lemon, 370 F.2d 847, 852 (5th Cir. 1967) cert. denied, 388 U.S. 911, 87 S. Ct. 2116. As § 505 of the Rehabilitation Act states that the "remedies" set forth in Title VI shall be available to any person aggrieved under § 504 of the Rehabilitation Act, the remedy of a private action under Title VI as approved in Cannon, supra, would be available under § 504 of the Rehabilitation Act.

Finally, the issue of the scope of the private action under § 504 of the Rehabilitation Act, is squarely before the Supreme Court pursuant to the Second Circuit's opinion in LeStrange, supra, at 769, and the Supreme Court may address that issue in its opinion in LeStrange.

Thus, as the two issues which have been raised by the Petitioner on which there is an actual split between the Circuits, are identical to the issues raised in LeStrange, supra, and as this Court has already granted Certiorari in LeStrange, granting the Petition for Writ of Certiorari in the instant case would not assist this Court in the formulation of its opinion as to the application of § 504 of the Rehabilitation Act.

II. THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IN THE INSTANT CASE IS IN ACCORD WITH THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IN LESTRANGE, SUPRA, AND AS LESTRANGE, WILL BE AFFIRMED BY THE SUPREME COURT, NO INJUSTICE WILL BE DONE BY DENYING THE PETITION FOR WRIT OF CERTIORARI IN THIS CASE.

The central issue in LeStrange, supra, and in the instant case involves the application of a federal statute, the Rehabilitation Act of 1973. It is axiomatic that in intepreting a statute, a court will first examine the language of the statute itself, and the statute will then be interpreted in the manner consistent with the "plain meaning" of the statutory language. Perrin v. United States, 444 U.S. 37, 42, 100 S. Ct. 311, 314 (1979); Fitzpatrick v. Internal Revenue Service, 665 F.2d 327, 329 (11th Cir. 1982).

The "plain meaning" of the broad language in § 504 of the Rehabilitation Act forbids an employer receiving federal funds from discriminating against its employees because of handicap, whether or not the purpose of the federal funding is to provide employment. This Court made an analogous ruling in North Haven Board of Education v. Bell, _____, U.S. _____, 102 S. Ct. 1912 (1982), in which it held that pertinent language in § 901(a) of Title IX, which is identical to the pertinent language in § 504 of the Rehabilitation Act, proscribes employment discrimination in a federally-funded education program.

The Petitioner, however, notes that Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (1978), cert. denied, 442 U.S. 947 (1979), and the cases which have followed it, hold that 42 U.S.C. 2000d-3 is made applicable to the Rehabilitation Act by § 505 of the Rehabilitation Act, and that 42 U.S.C. § 2000d-3 limits the application of the Rehabilitation Act in private actions to employers who receive federal funding for the primary purpose of providing employment.

First, it seems doubtful that § 505 of the Rehabilitation Act which states that the "remedies, procedures and rights" set forth in Title VI are applicable to § 504 of the Rehabilitation Act, would

make any provisions in Title VI, which would substantively limit the scope of the Rehabilitation Act, applicable to the Rehabilitation Act. To limit the substantive aspects of the Rehabilitation Act by the substantive provisions of Title VI would make the Rehabilitation Act a functional nullity.

However, there is no need to address that point in resolving the issues here in dispute, as the language in 42 U.S.C. § 2000d-3, specifically limits only actions by a "department or agency" and not a private action.

The fact that the "plain meaning" of the statutes in question provides the proper interpretation of these statutes is reinforced by the legislative and post-enactment history of the statutes. These topics are discussed in detail in the opinion of the Second Circuit in LeStrange, supra, and in the opinion of the Eleventh Circuit in Jones, supra.

Pursuant to the above rationale, the Respondent respectfully submits that the Second Circuit's opinion in LeStrange, which this Court will review on Certiorari, will be affirmed by this Court. If LeStrange is affirmed, no injustice will be done in the instant case by denying the Petition for Writ of Certiorari, as the Eleventh Circuit's opinion in this case is in accord with LeStrange.

CONCLUSION

The Petition for Writ of Certiorari should be denied in this case because granting the same would not act to anyone's benefit. First, as the issue raised in the instant case is identical to the issue raised in LeStrange, supra, which the Supreme Court has already agreed to review on Writ of Certiorari, granting the Petition for Writ of Certiorari in the instant case would not benefit the Court in clarifying the issue in question. Secondly, as the opinion in the instant case is in accord with the opinion in LeStrange, and the language, legislative history and post-enactment history of the statutes in question, together with the analogous precedent set in North Haven, supra, indicate that the Second Circuit's opinion in LeStrange will be affirmed by this Court, refusing to grant the Petition for Writ of Certiorari in this case will not act as an injustice to the Petitioner.

Therefore, on the basis of the foregoing, the Petition for Writ of Certiorari to review the judgment and the opinion of the Eleventh Circuit in this case should be denied.

Respectfully submitted,

NOVY & RUMSEY

By: _____
Eugene Novy

By: _____
Penelope W. Rumsey

AFFIDAVIT OF MAILING

Personally appeared before the undersigned officer, duly authorized to administer oaths, EUGENE NOVY, who states that he is Counsel of Record for the Respondent in this case and that he has timely filed the original and nine (9) copies of the foregoing "Response to Petition For Writ of Certiorari" with the Clerk of the Supreme Court, pursuant to Rule 28.2 of the Supreme Court, by placing the same in the United States mail on July 29, 1983, with adequate postage thereon, addressed to the Clerk of the Supreme Court, Supreme Court of The United States, Washington, D. C. 20543.

THIS, the 29th day of July, 1983.

Eugene Novy

SWORN and SUBSCRIBED TO
before me this 29th day of
July, 1983.

Notary Public
Fulton County, Georgia
My Commission Expires: July 25, 1987

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have this date served a copy of the within and foregoing "Response To Petition For Writ of Certiorari" upon all parties in this lawsuit by forwarding a copy to all counsel of record as follows:

Paul A. Howell, Jr., Esquire
Counsel of Record
W. Stell Huie, Esquire
KUTAK ROCK & HUIE
1200 Standard Federal Savings Building
Atlanta, Georgia 30303

Frances M. Toole
Brenda K. Pollard
Attorneys-at-Law
MARTA Office of Staff Counsel
2200 Peachtree Summit
401 West Peachtree Street, N.E.
Atlanta, Georgia 30365-4301

Attorneys for Petitioner

by placing same in the United States mail with sufficient postage thereon to insure proper delivery.

THIS 29th day of July, 1983.

Eugene Novy

1348 Ponce de Leon Avenue
Atlanta, Georgia 30306
(404) 378-0000

CFRB

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY,

Petitioner,

-vs-

GEORGE C. KELLY,

Respondent.

CASE NO. 82-1749

RESPONDENT'S MOTION TO PROCEED IN FORMA PAUPERIS

NOW COMES the Respondent, GEORGE C. KELLY, and pursuant to Rule 46 of the Supreme Court, moves this Court to allow him to respond to the Petition for Writ of Certiorari filed herein, and should such Petition be granted, to respond to Petitioner's Brief on the merits, in forma pauperis, by filing one typewritten copy of his Briefs, in accordance with Rule 39 of the Supreme Court. In support of this Motion, the Respondent submits his Affidavit attached hereto pursuant to Rule 46.1 of the Supreme Court, Fed. Rules App. Proc. Form 4, and 28 U.S.C. § 1915.

THIS 29th day of July, 1983.

NOVY & RUMSEY
Attorneys for Respondent

By: _____
Eugene Novy

By: _____
Penelope W. Rumsey

1348 Ponce de Leon Avenue
Atlanta, Georgia 30306
(404)378-0000

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY,	:	
Petitioner,	:	
-vs-	:	CASE NO. 82-1749
GEORGE C. KELLY,	:	
Respondent.	:	

RESPONDENT'S AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, GEORGE C. KELLY, being duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my Motion to Proceed in Forma Pauperis by submitting Briefs in accordance with Rules 39 and 46 of the Supreme Court, I state that because of my poverty I am unable to pay the costs of having forty-three (43) copies of my Response to Petitioner's Petition for Writ of Certiorari printed, and further would be unable to pay the costs of having my Brief on the merits printed should the Petition for Writ of Certiorari be granted; and that on the basis of the following facts I request this Court to allow me to proceed in forma pauperis.

I further swear that the following information relating to my financial inability to submit printed Briefs in the numbers required by Rules 22 and 35 of the Supreme Court is true and correct:

1.

I am unemployed. My last employment was with the Petitioner, METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY, as a traffic checker, earning a base salary of approximately $1,000.00 per month. The Petitioner terminated me on July 15,

1977, and it is the basis of my Complaint in this case and that the Petitioner discriminated against me because of my handicap in this termination.

2.

Since my employment was terminated on July 15, 1977, my only source of income has been disability benefits which I receive in the amount of $559.00 per month.

3.

My wife and I have a joint checking and savings account. There is no money in the savings account and there is a present balance of $300.00 in the checking account. Each month I deposit my disability check into the checking account and use this money to pay my wife's and my bills and living expenses. This is the source of the present balance in the checking account which will be spent on living expenses. In addition to my wife's and my day-to-day living expenses, I have indebtednesses totaling approximately $3,000.00, which I am attempting to pay off on a monthly basis.

4.

My wife and I own our home jointly, which has an approximate value of $50,000.00. We also own an automobile, a 1970 Hornet, with a market value of approximately $300.00. I have no other assets of any value.

5.

My wife is dependent upon me for support.

6.

I applied to The Honorable William C. O'Kelly, Judge of the United States District Court for the Northern District of Georgia, Atlanta Division, to be allowed to proceed to

the United States Court of Appeals for the Eleventh Circuit in forma pauperis to appeal the Order granting Petitioner's Motion for Summary Judgment in this case. He denied my motion. My son voluntarily funded the cost of printing the Brief for the Eleventh Circuit and ordering the Record required on appeal.

7.

The Supreme Court has required that my attorney respond to the Petition for Writ of Certiorari filed in this case by August 1, 1983. The estimates which my attorney has received for printing and binding this Brief in the numbers required by the Rules of the Supreme Court range from $600.00 to $800.00. I do not have sufficient funds to pay this expense, and if I could borrow this money, I do not have sufficient income to repay it.

I understand that a false statement or answer given in this Affidavit would subject me to penalties for perjury.

George C. Kelly
GEORGE C. KELLY, Respondent

SWORN and SUBSCRIBED to before me
this 27th day of July, 1983.

Notary Public
Fulton County, Georgia

My Commission Expires: July 25, 1987

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have this date served a copy of the within and foregoing "Respondent's Motion To Proceed In Forma Pauperis" and "Respondent's Affidavit In Support of Motion To Proceed in Forma Pauperis" upon all parties in this lawsuit by forwarding a copy to all counsel of record as follows:

Paul A. Howell, Jr., Esquire
Counsel of Record
W. Stell Huie, Esquire
KUTAK ROCK & HUIE
1200 Standard Federal Savings Building
Atlanta, Georgia 30303

Frances M. Toole
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Attorneys-at-Law
MARTA Office of Staff Counsel
2200 Peachtree Summit
401 West Peachtree Street, N.E.
Atlana, Georgia 30365-4301

Attorneys for Petitioner

by placing same in the United States mail with sufficient postage thereon to insure proper delivery.

THIS 29th day of July, 1983.

Eugene Novy

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(404) 378-0000